DANAU SURIA MINING SDN BHD

v.

TENGKU ZAITON IBNI AL MARHUM SULTAN ABU BAKAR

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[CIVIL SUIT NO: D-22 NCC-80-2010]
10 DECEMBER 2010

EQUITY: *Unclean hands - Unconscionable conduct - Agreement between plaintiff miner and defendant mining lease holder - Plaintiff's signatory to agreement undischarged bankrupt - Fact of bankruptcy concealed from defendant - Signatory pretended to be plaintiff's Managing Director - Deliberate failure by plaintiff to submit mining report for issuance of mining lease - Fundamental breach that nullified agreement - Plaintiff commenced mining without authority - Defendant's signature on Permit to Mine forged - Plaintiff accepted defendant's termination of agreement then sought specific performance - Whether plaintiff entitled to any equitable remedy*

The defendant, a member of the Pahang Royal family, entered into an agreement ('the Agreement') with the plaintiff by which she granted the plaintiff the exclusive right to mine for and sell iron ore extracted from a parcel of land. The Agreement was signed in anticipation of the defendant obtaining a mining lease ('the lease') over the land. The lease was granted two months after the execution of the Agreement. Upon signing of the Agreement, the plaintiff, as covenanted, paid RM1m as deposit ('the deposit') to the defendant and was required, within 30 days, to submit to the defendant a mining report prepared by a professional miner/consultant for the purpose of obtaining the mining certificate/lease. This requirement was mandated by s 63 of the Pahang Mineral Enactment 2001. The plaintiff failed to submit the report despite being given an extension of time to do so. The Agreement provided that failure to submit the report rendered the Agreement null and void and entitled the defendant to forfeit the deposit, which it did.

The defendant alleged the plaintiff was guilty of various other breaches that entitled it to terminate the Agreement. These included the fact that (i) the plaintiff's signatory to the Agreement not only misrepresented himself to be its Managing Director, but

A concealed the fact he was also an undischarged bankrupt (ii) the plaintiff had, without the defendant's knowledge, entered on the land and carried out mining illegally (*ie*, before it had been issued with an Operational Mining Scheme (OMS) by the authorities) (iii) the defendant's signature on a Permit to Mine had been forged
B (iv) the plaintiff had used foreign and illegal workers in the mining works contrary to the conditions of the lease and (v) the defendant had not received any income from the mining operations for almost a year.

C The plaintiff maintained it had complied with all the necessary contractual obligations and had commenced mining only after obtaining the OMS. It said the Permit to Mine was signed by the defendant and that the reason it did not submit the mining report was because the lease was issued two months after the execution
D of the Agreement. The plaintiff sued for specific performance of the Agreement, a declaration that it had been wrongly terminated and for general damages. The defendant counterclaimed for a declaration that the Agreement was null and void on account of the plaintiff's failure to submit the mining report, or, alternatively,
E that it had been terminated by the breaches of the plaintiff, a declaration that the forfeiture of the deposit was lawful, special damages, general damages, and aggravated/exemplary damages.

F **Held (dismissing the claim with costs to be taxed and allowing the counterclaim (excluding the claim for general damages and aggravated/exemplary damages) with costs to be taxed):**

(1) The plaintiff's failure to provide the mining report rendered the Agreement null and void, or, alternatively, afforded a ground
G for termination. The plaintiff could not take it upon itself to rewrite the contract and deem the requirement for the report as unnecessary particularly in the light of clear statutory provisions. (paras 15 & 37)

H **(2)** The evidence showed the plaintiff had accepted the defendant's termination of the Agreement. It was not open to the plaintiff to claim for specific performance after accepting the termination. (para 15)

I **(3)** The plaintiff came to court with tainted hands, particularly when it sought to rely on a forged Permit to Mine, such that it did not deserve, and was not entitled to, any relief of the

court. The evidence through its principal witnesses was less than candid and in material respects was not supported or corroborated by the totality of the evidence. (paras 57 & 15)

(4) The defendant was misrepresented into thinking the plaintiff's signatory to the Agreement was its Managing Director, when he was not, and the fact he was also an undischarged bankrupt at the time of the signing was consciously and purposefully kept hidden from her. (para 15)

(5) There was concrete evidence to show there were mining activities on the land even before the plaintiff was authorised to do so by the issue of the OMS. (para 15)

(6) The defendant had proved on a balance of probabilities that her alleged signature on the Permit to Mine was forged. (paras 55)

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Kwan Chew Shen v. Citibank NA [1987] 1 CLJ 314; [1987] CLJ (Rep) 704 HC ***(refd)***

MBF Finance Bhd v. Sykt Noma Pengangkutan Sdn Bhd & Ors [1999] 4 CLJ 734 HC ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

Omega Securities Sdn Bhd v. Kok Fook Loy [2010] 8 CLJ 888 HC ***(refd)***

Phua Corp Sdn Bhd v. Newacres Sdn Bhd [1992] 4 CLJ 2179; [1992] 3 CLJ (Rep) 274 HC ***(refd)***

Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals [2008] 3 CLJ 692 CA ***(refd)***

Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***

The Topps Company Inc v. Mally Jaya Sdn Bhd [1998] 2 CLJ Supp 235 HC ***(refd)***

Trollope v. Colls Ltd [1973] 2 All ER 262 ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 38(1)(d), (2), 109
Companies Act 1965, s. 125(1)
Evidence Act 1950, s. 114(g)
Mineral Development Act 1994, s. 40
Mineral Enactment 2001 (Pahang), s. 63

A *For the plaintiff - Annou Xavier (Phang Kian Chung with him); M/s Lee Swee Seng & Co*
For the defendant - Jason Chan (Gerald Samuel with him); M/s Soraya Chuah & Assocs

B *Reported by Ashok Kumar*

JUDGMENT

C **Mohamad Ariff Yusof J:**

[1] This dispute concerns alleged breaches of a Mining Agreement where the plaintiff is the miner and the defendant is the leaseholder of a mining land situated in Sungai Ganoh, Mukim Keratong, Daerah Rompin, Pahang Darul Makmur.

D **[2]** By its pleadings, the plaintiff claims the following relief:

(a) A declaration that the defendant has unilaterally, unlawfully and without just cause terminated the Mining Agreement dated 11 August 2009;

E (b) General damages resulting from the termination of the Mining Agreement to be assessed by this court;

(c) Interest, costs and such a relief as this court deems fit.

F **[3]** The defendant has a counterclaim, by which she is claiming the following:

(a) A declaration that the Agreement dated 11 August 2009 between the plaintiff and the defendant is null and void, or
G alternatively, has been terminated by the breaches of the plaintiff;

(b) A declaration that the deposit of RM1,000,000 paid by the Plaintiff has been lawfully forfeited by the defendant;

H (c) Special damages of RM1,800,000 (based on a minimum monthly tribute of RM300,000 from January 2010 until June 2010 until such time to such time the suit herein is disposed of);

I (d) General damages of RM5,000,000;

(e) Aggravated/exemplary damages of RM5,000,000;

(f) Interest at 8% per annum on the amount of damages awarded from the date of filing of the counterclaim until full realisation; A

(g) Costs;

(h) Further and/or other reliefs deemed fit. B

[4] The case for both the plaintiff and the defendant are succinctly summarised in the respective summary of case explained and read out to this court at the commencement of the trial proceedings. The dispute between the parties was therefore clearly marked out right at the outset. I reproduce a summary of the case for each party below. C

The Plaintiff's Case

[5] The plaintiff and defendant had entered into a Mining Agreement on 11 August 2009 by which the defendant had appointed the plaintiff as the miner of the mining parcel. Under cl. 2 of the Mining Agreement it is provided that the defendant as leaseholder "in anticipation of the approval of the Mining Lease by the relevant authority is desirous to grant to the miner (the plaintiff) the sole exclusive right to carry out mining operations on the said parcel to work and win the iron ore ..." The leaseholder, under cl. 1 of the agreement, allowed and granted to the miner "full liberty to enter into the said land and carry out mining operations ... for the purpose of winning and selling iron ore at the sole discretion of the miner ..." Under cl. 2.2, the miner was to pay to the leaseholder upon the signing of the agreement "earnest money" of RM1,000,000 which was to be repaid from the tribute payment to the leaseholder at the rate of 30% of the monthly tribute payment. Under cl. 6.1 it was provided: D E F G

> ... within 30 days after the signing of this Agreement, Miner shall complete and submit a mining report prepared by a professional miner/consultant at Miner's own expenses to the Leaseholder for onward transmission to the relevant authorities for obtaining mining certificate/lease ... H

[6] It is the plaintiff's case that it had complied and fulfilled the above stated requirements in cl. 2 and cl. 6.1 of a Mining Agreement when the mining lease was obtained from the director of land and mines, Pahang on about 15 October 2009. It is also argued: I

> An Operational Mining Scheme (OMS) was issued by the Minerals and Geoscience Department of Pahang (JMG). The OMS was issued by the JMG on about 3.2.2010 and is valid until 4.11.2010. The OMS states that the legal Miner is the Plaintiff. The fact of this OMS is to enable the Plaintiff to physically carry out the mining operation of the iron ore from the said mining parcel.
>
> Until and unless an OMS is issued by the said authority under the Mineral Development Act 1994, no party such as the Plaintiff can carry out mining of a mineral on the mining parcel.

[7] It is also important to note at the outset, the following statement of the case of the plaintiff:

> The Plaintiff had never carried out mining of the iron ore on the Plaintiffs land until the OMS was issued by JMG. Prior to the issuance of the OMS, the Plaintiff only carried out clearing of trees and bushes in, around and leading to the mining parcel, paving and construction of a road or passageway, commissioning of a palong and waterway, commissioning of equipment on the mining parcel.

[8] It is therefore a fundamental point in the plaintiff's case that there was no mining on the land prior to the grant of the OMS.

[9] I quote the remaining portion of the plaintiff's summary of the case:

> Further, the Plaintiff had also executed a Permit to Mine on 5.11.2009. The Permit to Mine was signed by Ms Cheng Kam Thai, a Director of the Plaintiff and witnessed by Ms Theresa Anthonysamy, whilst the same was signed by the Defendant and witnessed by Bouhmidi Abdelali.
>
> The Plaintiff will lead evidence and submit that since the Mining Lease was already issued on 15.10.2009, a mining report was therefore no longer necessary for the purpose of submitting to PTG Pahang as it has become superfluous. Further, evidence will be led that since the mining parcel falls under an old mining scheme where Mining Lease had already expired, the PTG of Pahang will therefore not require a mining report before the issuance of the aforesaid Mining Lease. Section 41 of the Mineral Enactment of Pahang 2001 will be relied at the submissions stage.
>
> Accruing from this Mining Agreement, the Plaintiff had entered into contracts with 2 companies, namely one Gahara Jaya Sdn Bhd on 30.11.2009 and Jiaxing Import-Export Co Ltd on 5.12.2009 respectively for the sale of the iron ore to be extracted from the said mining parcel … pursuant to the Mining Agreement …

Hence, the Plaintiff has contended and would stand by that position that the Mining Agreement is still subsisting and in force and not null and void for want of compliance of Mining Agreement. ...

[10] In short, the plaintiff contents it has complied with all the necessary contractual obligations and proceeded to mine the iron ore on the said parcel only after it had obtained the OMS. It has not supplied the mining report since this requirement is superfluous, given that the mining lease has been issued by PTG, Pahang.

The Defendant's Case

[11] The following is a brief summary of the defendant's case as outlined in counsel's opening statement:

1. In this suit the plaintiff is essentially seeking for equitable remedy from the court for specific performance of a Mining Agreement dated 11.8.2009.

2. In the course of the defence, the Defendant will show that the suit is a non-starter due to the Plaintiff's failure to comply with the crucial and mandatory requirement of the Agreement, which provides expressly that the Agreement shall be deemed null and void and the deposit forfeited should the Plaintiff fail to provide mining report. The Plaintiff will attempt to justify *ex post facto* that the report was not necessary, but such contention is contrary to the Mineral Enactment itself, as well as testimony of officers from the land office.

3. To compound matters further, the Plaintiff's impugned conduct, evidenced before this Court, meant that it never had clean hands before this Court to seek equitable remedy.

4. Numerous contractual obligations, laws and specific requirements of the Mining Lease were breached willy-nilly by the Plaintiff, in a manner which can only be described as cavalier, and even contrived.

5. But what transpired is no laughing matter. The Plaintiff, more precisely the individuals behind it, are prepared to resort to anything to achieve their objectives without hesitation, even to the extent of forging the signature of the Defendant and to lie under oath.

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6. Evidence of their witnesses are simply beset by lies, inconsistencies and impossibility, and wholly inconsistent whether between themselves, or with each other.

7. However, the resulting consequence on the Defendant is dire, and the loss and harm which has befallen her is real and substantial.

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8. The Defendant shall seek to be recompensed for nearly a year for which she has derived no income from the mine resulting from the wrongful acts of the Plaintiff. The Defendant shall also seek to disgorge the Plaintiff from the wrongful profits they derived from the illegal activities of the mine at her expense. Lastly, the Defendant shall also be seeking aggravated and exemplary damages against the Plaintiff warranted in the circumstances by the conduct of the Plaintiff itself.

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D

[12] It is therefore the case for the defendant that the plaintiff had failed to comply with the crucial and mandatory requirement of the agreement in relation to the provision of the mining report and as such, by express provision, the agreement is to be deemed null and void and the deposit forfeited. The provision of the mining report, by the defendant's argument, is mandated by the Mineral Enactment of Pahang and further, numerous contractual obligations, and laws on specific requirements of the mining lease have been breached by the plaintiff, and the plaintiff, through the individuals behind it, has shown that it was prepared to resort to anything to achieve its objective including forging the signature of the defendant and for its witnesses to lie under oath.

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[13] The forgery of the defendant's signature in particular relates to the execution of the permit to mine which is an essential document in the process leading to the issuance of the Operational Mining Scheme (OMS).

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This Court's Findings And Conclusions

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[14] Having heard the testimony of the witnesses (eight witnesses for the plaintiff and three witnesses for the defendant), considered the documentary evidence, observed first hand by way of a site visit the actual location of the mining lease, the boundary and the structures thereon as well as evidence of activities carried out there, evaluated the law and the submissions of counsel, I am of the considered view that the plaintiff has failed to prove its case on the requisite standard ie, balance of probabilities, for reasons

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which I will elaborate below. On the other hand, I find that the defendant has succeeded in proving its case on the counterclaim. I am therefore dismissing the plaintiff's claim with costs to be taxed and ordering and entering judgment in favour of the defendant for the counterclaim in the following terms:

(a) That the Agreement dated 11 August 2009 between the plaintiff and the defendant is declared null and void, or alternatively, has been terminated by the breaches of the plaintiff;

(b) That the deposit of RM1,000,000 paid to the plaintiff be lawfully forfeited by the defendant;

(c) Special damages of RM300,000 per month from January 2010 until the date of this judgment;

(d) Interest at 8% per annum on the amount of damages awarded from the date of filing of this counterclaim until full realisation;

(e) Costs to be taxed;

(f) An order that the original approval letter, Mining Lease, the certified true copy of the permit to mine and OMS be returned to the defendant by the plaintiff forthwith;

(g) An order that the original permit to mine (ID 8) and the original purported agreement in relation to a vehicle WSP8850 (ID 89) be released to the police for the furtherance of their investigation in relation to the forgery of these documents.

[15] My summary findings are as follows:

(1) The evidence shows the plaintiff has not come before this court with clean hands and thus must be disentitled to the equitable relief of specific performance that it has prayed for. The evidence presented through its principal witnesses, particularly PW1 and PW7 are less than candid, and in material respects are not supported or corroborated by the totality of the evidence. The conduct of PW7 is particularly noteworthy. I find it proven from his own cavalier evidence that the defendant was misrepresented by him into thinking he was the Managing Director of the plaintiff when he was not, and the fact that he was additionally an undischarged bankrupt at the time the agreement was signed was consciously and purposefully kept hidden from her. The

A argument by the plaintiff that he was authorised by a proper resolution to sign on behalf of the company, although a bankrupt, rings hollow and I find this evidence too to be highly questionable.

B (2) Despite initial denials of not carrying out mining activities on the defendant's mining parcel, there is now concrete evidence to show that there were such mining activities, even before it was authorised to do so by the issue of the OMS or Operational Mining Scheme on 3 February 2010. The C denial by PW1 is flatly contradicted by the plaintiff's own witness, PW5 (the plaintiff's subcontractor) who confirmed that his workers were cleaning and washing iron ore on that parcel using the palong situated there since November 2009. PW5 also confirmed the plaintiff transported the iron ore out.

D (3) Evidence of such mining activities was immediately apparent to the naked eye during the site visit that I made on 13 November 2010. From what I observed, the testimony of PW1 has to be very seriously questioned. Regretfully I have to observe and conclude that PW1 is not a witness of E truth. The boundary markers are readily discernible and it is simply highly improbable to believe the plaintiff could have mistaken the defendant's parcel from the adjoining parcel belonging to Tengku Shahariah.

F (4) In any event, even if the plaintiff was carrying out mining activities on Tengku Shahariah's land in November, it would still be unlawful since even the OMS for the latter was only issued on 19 January 2010.

G (5) The claim by the plaintiff, as testified by PW1, that it only carried out mining in a limited way between 2 April 2010 until 10 May 2010 (the date between the interim injunction granted by the High Court allowing it to carry out mining activities and the interim injunction granted by the Court of H Appeal restraining it from carrying out the mining activities pending appeal, is flatly contradicted by the evidence of the surveyor, DW2 (Ahmad Fadzil bin Kassim) DW1 and DW2, who witnessed the mining activities in January and February. The photographs produced by the defendant (D27 and I D28), as well as the detailed survey plan produced by DW2 (D81) corroborates and confirms this. From my observation during the site visit and confirmation of where the stockpiles

of mineral ore were placed, the defendant's version of the facts is more probable of belief and nearer to the truth rather that the vacillating evidence provided by the plaintiff. In this regard, I agree with the argument advanced by plaintiff's counsel who questioned the reason why the palong and the "kongsi" were set up on the plaintiff's land instead of Tengku Shahariah's land, and that it defied logic why the iron ore, supposedly from Tengku Shahariah's land, was stockpiled on the plaintiff's land.

(6) The probability of mining activities having been carried out before April 2010 is further corroborated by the letter issued by PW4 (Zainal Abidin bin Md Nor) from JMG who reportedly noted activities "menjurus kepada kerja perlombongan" (D25) on the defendant's land.

(7) There is no dispute that there was no mineral report done and provided by the plaintiff despite the clear wording of the agreement. Parties have to be held bound to their contractual bargain. Failure to provide the mining report within the time stipulated and the extension allowed by the defendant, renders the agreement null and void, or alternatively affords a ground for termination.

(8) It is clear from the evidence that the plaintiff accepted the termination, and subsequently filed this claim for *inter alia* specific performance. It cannot be open to the plaintiff to claim for specific performance after accepting the termination of the agreement by the defendant.

(9) As regards the signing of the permit to mine, I have considered the totality of the evidence, not only the evidence of the handwriting expert (PW8; Iskandar bin Azman). Despite the rigorous cross examination, PW 8 was consistent in maintaining the signature of DW1 on P88 and ID8 was not hers. The strongest evidence for the plaintiff comes from PW2 (Theresa Anthonysamy, Chua Soo Heng's clerk/secretary), but PW2 is not a completely impartial witness, and this fact has to be placed alongside the evidence of the handwriting expert, and the failure by the plaintiff to call Cheng Kam Thia, the other signatory, as a witness. I draw an adverse inference under s. 114(g) of the Evidence Act against the plaintiff for this failure. Although not beyond a shadow of doubt that DW1's signature was forged, the burden on the defendant is to satisfy this court on a balance

of probabilities, and on this she has succeeded. It is of no assistance to the plaintiff that the signature of Cheng Kam Thai on ID8 has been shown to be markedly different from her signature on the affidavit signed by her in this proceeding and the fact that PW7 gave an incredibly odd explanation on this, namely that she has more than one signature!

(10) I also find there are breaches of relevant laws in relation to the employment of foreign workers on the land, which would provide another reason for termination of the agreement.

(11) Proof of damages and quantification thereof is a matter of evidence, and thus the defendant's claim for general damages of RM5 million based essentially on the unauthorised mining has to be tested on this requirement. I cannot find sufficient proof to quantify this amount. In any event, the special damages awarded of RM300,000 per month from January 2010 until the date of this order will provide suitable and adequate compensation for the loss occasioned by the breaches of the agreement by the plaintiff.

(12) As for the claim for exemplary and aggravated damages, I am of the view this is not an appropriate case to so award, being essentially a claim in contract, for which the main consideration is compensatory relief. The defendant should not be placed in a position when she will additionally gain a windfall,

[16] I now provide my detailed reasoning and the authorities in support of my conclusions.

Background Facts

[17] This dispute, as seen above, revolves around a mining lease granted to the defendant by the Director of Land and Mines, Pahang over a parcel of land described as Topo Sheet No. 4257, Sungai Ganoh, Mukim Keratong, Daerah Rompin, Pahang Darul Makmur. The mining lease covers an area of approximately 40 ha which is the equivalent of 98.84 acres. The mining lease itself is dated 15 October 2009.

[18] The defendant is a member of the Pahang Royal family.

Agreement Of 11 August 2009

[19] On 11 August 2009, the defendant and the plaintiff entered into an agreement by which the defendant agreed to grant to the plaintiff an exclusive right to carry out mining operations on the mining lease on terms and conditions as contained in the agreement.

[20] This agreement was signed by the defendant and a person named Chua Soo Heng (PW7) who presented to the defendant at that time that he was the Managing Director of the plaintiff. Chua Soo Heng provided his business card to the defendant in which he so represented himself in addition to representing himself as also the Managing Director of another company called Warisan Perlombongan Sdn Bhd and the Director of a third company called Danau Suria Trading Sdn Bhd.

[21] Chua Soo Heng was at all material times an undischarged bankrupt, who was never the Managing Director of the plaintiff.

[22] Chua Soo Heng did not inform or made known that he was a bankrupt to the defendant. The following answers in his cross examination make it clear:

1.Q : Did you inform the Defendant that you were a bankrupt at that time?

A : She didn't ask me and I also did not inform her.

2.Q : Refer to page 1 of Bundle A. The Agreement was dated 11.8.2009. At page 12 do you confirm this is your signature?

A : Yes.

3.Q : This was signed by you on 11.8.2009?

A : Yes in front of the lawyer.

4.Q : Prior to signing this Agreement, have you at any point informed the Defendant that you are bankrupt?

A : She didn't ask me and I didn't inform her.

5.Q : As long as she doesn't ask you, you felt that you have no need to inform her?

A : Yes. Because my company has let known about there is resolution for me to represent the company to sign the Agreement.

A 6.Q : The resolution was given because you are bankrupt?

A : I disagree.

7.Q : Look at page 24 of Bundle B. Is this the resolution?

B A : I do not know. Only later the director informed me.

8.Q : When you signed the Agreement you did not know this resolution existed?

A : I knew. My director informed me.

C 9.Q : Your answer No. 68 above state that "later the director informed you?"

A : Director asked me to go and sign because there was resolution but he did not pass the resolution to me to

D sign.

10.Q: Did you inform the Defendant about the resolution before signing the Agreement?

A : No because she did not ask me.

E 11.Q: Did you inform the Defendant that you were a bankrupt at that time?

A : She didn't ask me and I also did not inform her.

F **[23]** I find this dismissive attitude on the part of the witness, and therefore also the plaintiff, very disturbing. When parties enter into an agreement, surely commercial morality and the duty of general good faith must require the necessary degree of disclosure to the extent that the bankrupt who portrays himself as the Managing

G Director of the contracting party, and therefore lead the other contracting party to believe that he has the necessary legal qualification and authorisation to execute the contract, cannot be allowed to still argue that the validity of the contract has not become infected by this kind of conduct amounting to fraudulent misrepresentation.

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[24] I do not believe that the general rule that a bankrupt can enter into a contract is relevant on the facts of this case. In *Re Kwan Chew Shen v. Citibank NA* [1987] 1 CLJ 314; [1987] CLJ (Rep) 704, for instance, it was held that there appeared to be no

I blanket provision anywhere in the Bankruptcy Act to the effect that a bankrupt was incapable of entering into a contract. This general rule, with respect, cannot be taken as implying that the

bankrupt who purports and represents to act as a Managing Director of a company can shelter behind this rule. The more relevant provision in the Bankruptcy Act in this connection is s. 109, and it is necessary to quote the relevant parts to emphasise why the act by Chua Soo Heng cannot be allowed to remain unchallenged. I quote:

109. Punishment of Fraudulent Debtors

(1) Any person who has been adjudged bankrupt or in respect of whose estate the receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:

...

(m) If being an undischarged bankrupt:

(i) ...

(ii) Either alone or jointly with any other person engages in any trade or business or enters into any contract in furtherance of any trade business, unless he proves that before engaging in the trade or business or before entering into the contract he informed the person with whom he engages in the trade or business or with whom he entered into the contract that he was an undischarged bankrupt; ...

[25] Mention must also be made of s. 38(1)(d) and s. 38(2) which provide:

38. Consequences of Refusal of Discharge

(1) Where a bankrupt has not obtained his discharge:

...

(d) the bankrupt shall not, except with a previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a Director of any company or otherwise directly or indirectly take part in the management of any company; ...

(2) A bankrupt who makes default in performing and observing the provisions of the section ... shall be deemed guilty of a contempt of court, and shall be punished accordingly on the application of the Director-General of Insolvency.

[26] Both sections were referred to in the High Court case of *The Topps Company Inc v. Mally Jaya Sdn Bhd* [1998] 2 CLJ Supp 235, which was a case relating to a Trade Description Order, but the general principles are equally applicable to his instant case. Law Hop Bing J (as his Lordship then was) held at p. 239 of the report as follows:

> In my judgment, a person who is an undischarged bankrupt at the time of affirming an affidavit must disclose his incapacity eg, his status as an undischarged bankrupt to the attention of the court, especially where, as in this case, the affidavit is in support of an *ex parte* application which is an application *uberimae fidei* ... The nondisclosure of this material fact pertaining to the deponent's capacity as an undischarged bankrupt a falling short of the standard of utmost good faith and the *ex parte* TDO granted pursuant thereto should, on the ground alone, be set aside ...
>
> Section 38(1)(d) and section 109(m)(d) of our Bankruptcy Act 1967 ... clearly prohibit an undischarged bankrupt from otherwise directly or indirectly taking part in the management of any company. The prohibition is very wide in its scope and certainly wide enough to prohibit the deponent holding himself out in his affidavit as, a "general manager" where the deponent was an undischarged bankrupt at the time of affirming his affidavit.

[27] I have borne in mind the authority submitted by learned counsel for the plaintiff, namely *MBF Finance Bhd lwn. Sykt Noma Pengangkutan Sdn Bhd & Ors* [1999] 4 CLJ 734 which seems to imply that it would be in order for a bankrupt to sign an agreement for and on behalf of a company if he is authorized by the Board of Directors to do so. Two points are to be noted in this connection. The High Court there held there was no evidence to establish the bankrupt had acted as a Director. Secondly, s. 109 of the Bankruptcy Act was not cited before the court. I am therefore of the view this particular decision can be distinguished on the facts.

[28] In the course of this trial, the plaintiff has produced a purported resolution by the Directors of the plaintiff to authorise Chua Soo Heng to sign the Mining Agreement. This resolution appears as exh. P3. Even assuming this resolution can be accepted as a valid resolution and existed at the time the Mining Agreement was executed, the point is that this fact was never brought to the attention of the defendant at the time of the execution of the contract. I agree with counsel for the defendant who noted, in

doubting the veracity of this resolution, that it is inconceivable that despite the importance of this document, the plaintiff or its solicitors, never referred to it in its letter in answer to the defendant's challenge on PW7's capacity to sign the agreement. Even more telling is evidence led through exh. D78, namely the letter of the plaintiff to Kementerian Sumber Manusia & Alam Sekitar, which shows PW7 signing the letter as a "pengarah" of the plaintiff.

[29] For completeness, s. 125(1) of the Companies Act will also cover the conduct of this particular undischarged bankrupt. Section 125(1) provides:

> 125(1) Every person who being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any corporation except with the leave of the court shall be guilty of an offence against this Act.
> Penalty: Imprisonment for five years or 100,000 ringgit or both.

[30] In terms of coming to court asking for equitable relief, the plaintiff has on the facts of this case clearly, in my mind, proceeded with tainted hands. The defendant has not advanced her case based on the invalidity of the agreement on this ground, but is content to merely deny any claim by the plaintiff on the basis they have proceeded with tainted hands. Nevertheless, I must say on these facts, a case can possibly be made to regard the entire Mining Agreement as null and void on this ground as well.

Relevant Terms And Conditions Of The Agreement

Clause 6.1

[31] In the course or this dispute, cl. 6.1 took a prominent position. It is central to the defendant's case. The defendant argues there was a breach of cl. 6.1 which renders the agreement null and void. This is how cl. 6.1 reads:

> Within 30 days of the signing of this Agreement, Miner shall complete and submit a mining report prepared by a professional mining engineer/consultant at Miner's own expenses to the Leaseholder for onward submission to the relevant authorities for obtaining mining certificate/lease. In the event the Miner shall be unable to submit the mining report within the 30 days period, then this Agreement shall be deemed to be null and void and leaseholder shall forfeit the deposit.

[32] The "deposit" refers to the sum of RM1,000,000 paid by the miner upon the signing of the agreement to the leaseholder. The sum is treated as earnest money which is to be repaid from the tribute payment payable to the leaseholder at the rate of 30% of the monthly tribute payment.

[33] The "tribute" is calculated at the rate of RM30 per tonnes of iron ore, with the miner agreeing that the total production of iron ore from the mining lease shall be not less than 10,000 tons per month.

[34] Certain rights and obligations of the miner are spelt out in cl. 3 of the agreement. In particular the miner shall have the right to enter upon the said parcel "to explore search for dig win work and obtain and excavate iron ore" for the miner's own benefit in any manner at the absolute discretion of the miner without having to account to the leaseholder. Additionally, the miner can erect "and to place such plant and machinery and to open sink and make such mines quarries levels watercourses settling ponds and other work whether upon or below the surface of the said parcel as may be necessary or convenient to the Miner." Generally, the Miner can also "to do all things which shall in the miner's sole opinion or absolute discretion be convenient or necessary in accordance with the terms of this agreement for winning working getting making merchantable processing selling and/or disposing of the iron ore and all other minerals in any form or aggregate form including in rock form in or under the said parcel and for obtaining the benefits of the right liberties and privileges granted herein."

Miner's Covenant

[35] Numerous covenants and undertakings expected of the miner are provided in cl. 4. Some of the material provisions read:

> (b) to indemnify the leaseholder and keep the Leaseholder indemnified against all claims proceedings demands costs action for injury or damage arising as a consequence of any willful acts or omissions of the Miner in connection with its operation under this Agreement;
>
> (c) to pay all tributes and all such payment hereunder payable by the Miner;
>
> (d) at all times and at its own expense to comply with the requirements of the Mineral Act and all statutory and legal provisions in relation to the operations of the mine and the

maintenance thereof and without prejudice to the foregoing with all obligations imposed by any other Acts of Parliament or any orders or regulations made thereunder for the time being in force and with the terms and conditions of any planning permission from time to time affecting the said parcel;

...

(f) to observe, perform, satisfy, comply with, adhere to and/or abide by all relevant federal, state and/or governmental laws, statutes, bylaws, directives, circular, instrument, legislation, enactment, notice instructions, compounds with respect to its operations under this Agreement including but not limited to compliance with all applicable safety, health, and environmental laws, rules and regulations;

(g) not to do anything which would in any way compromise prejudice or adversely affect or diminish the leaseholder's right or interests in respect of the Mining Lease which shall necessarily include taking all necessary steps and action to ensure that such right or interests are not in any way compromised, prejudiced, adversely affected or otherwise diminished; ...

Leaseholder's Covenant

Clause 5.1

[36] This clause provides:

The Leaseholder covenants and undertakes that:

(a) that so long as the Miner shall serve and perform the term and covenants herein covenanted to be performed by the Miner, the Miner shall peaceably hold and enjoy the subject matter of the benefits of the grant herein during the term of this Agreement without disturbances by or from Leaseholder or any person claiming under or through the Leaseholder or by way of title paramount;

Failure To Provide The Mining Report

[37] As noted above in summarising the plaintiff's case, the plaintiff takes a position that it did not need to provide the mining report since it became superfluous when the mining lease was granted. With respect, this is a matter of contractual intent between the parties. The plaintiff cannot take it upon itself to

A rewrite the contract and deem the requirement to provide a mining report unnecessary, particularly in light of clear statutory provisions. Section 63 of the Pahang Mineral Enactment 2001 provides:

> Application for Mining Lease:
>
> B 63(1) An application for a Mining Lease shall be made to the said authority in the prescribed form.
>
> (2) An application for Mining Lease shall include a pre-feasibility study which shall include:
>
> C (a) a general description of the proposed Mining Scheme;
>
> (b) the expected commencement date of mineral production (to be stated as the number of months from the date of issuance of a Mining Lease);
>
> D (c) schedule of estimated annual raw ore production for the term of the Mining Lease;
>
> (d) such information as may be prescribed; and
>
> (e) such other information as the state authority may
> E reasonably require for the discharge of its functions in relation to the application.
>
> (4) In considering an application for Mining Lease for the purpose of making its recommendation, the committee shall
> F verify that the applicant:
>
> (a) has complied with the requirements of this enactment; and
>
> (b) is technically and financially qualified to develop and
> G mine the area to which the application relates.

[38] As often stated, it is not the function of the court to rewrite a contract for the parties. See for instance the case cited by the defendant, *Phua Corp Sdn Bhd v. Newacres Sdn Bhd* [1992] 4 CLJ 2179; [1992] 3 CLJ (Rep) 274:

H
> ... in the interpretation of the terms of the contract the judge is not to impose new terms in or rewrite a contract and his function is only to express the intention of the parties to the contract -

[39] See also *Trollope v. Colls Ltd* [1973] 2 All ER 262, cited in
I *Phua Corp Sdn Bhd v. Newacres Sdn Bhd*:

> The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable ...

[40] See also the case cited by counsel for the defendant, namely *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23:

> For the purposes of construction of contracts, the intention of the parties is the meaning of the words they have used. In *Schuler (L) AG v. Wickman Machine Tools Sales Ltd* [1974] AC 235 ... Lord Simon of Glaisdale approved the following passage in Norton on Deeds (second edition) at page 50:
>
> ... the question to be answered always is, "what is the meaning of what the parties have said?" not "what did the parties mean to say?" ... it being a presumption *juris et de jure* ... that the parties intended to say that which they have said.

[41] Taking the plaintiff's submission on this point, it seems to me that the plaintiff is saying the parties mean that there is no requirement to submit the mining report if it is not necessary for the mining lease. This position cannot be correct in law since the abovesaid s. 63 of the Enactment requires the parties to submit the mining report. It is also argued by the plaintiff that there is no such requirement when an area covers an old Mining Lease. There is no such evidence presented before me, and arising from the site visit done, it is clear the parcel of land concerned has not been worked on before as a mining area. It was clearly a virgin, forested area before being cleared. I agree with counsel for the defendant when he submits that the plaintiff has failed to produce a shred of evidence to show that the mining is an ex mining land.

[42] The evidence of PW3 (En Ghazali bin Hj Abu Bakar), an Officer from PTG reaffirms the legal requirement under s. 63 of the Mining Enactment. See Q & A 30 to 39 of the notes of proceedings (cross examination):

> 30 S: Menurut seksyen 63 ini adakah ianya dinyatakan seseorang yang ada lesen mencarigali sebelum pajakan melombong itu tidak diperlukan atau dikecualikan dari menyerahkan mining report yang diwajibkan di bawah seksyen 63(2) dimana dinyatakann di sini?
>
> J: Perlu serahkan mining report.

A

31 S: Perlu dan wajib?

J: Benar, sekiranya seseorang itu memohon pajakan melombong.

32 S: Rujuk ms. 16-19 Ikatan A. Boleh sahkan ini adalah surat kelulusan sebelum surat pajakan melombong dikeluarkan?

B

J: Benar.

33 S: Adakah surat-surat pajakan melombong adalah seperti di ms 16?

C

J: Benar.

34 S: Sila rujuk ms 1-4 Ikatan D. Boleh sahkan ini adalah pajakan melombong yang dikeluarkan oleh PTG kepada Defendan?

D

J: Saya sahkan.

35 S: Adalah juga termasuk syarat-syarat yang dinyatakan sebentar tadi?

E

J: Benar.

36 S: Syarat-syarat tersebut perlu sentiasa dipatuhi pemegang pajakan melombong tersebut?

J: Benar.

F

37 S: Tadi kamu nyatakan kamu bersetuju bahawa laporan mining report adalah wajib di bawah seksyen 63?

J: Benar.

38 S: Pernahkah kamu sesekali memberitahu Chua Soo Hing dan menasihatkannya bahawa mining report tersebut tidak diperlukan?

G

J: Tidak pernah.

39 S: Sekiranya terdapat sebarang pelanggaran Enakmen Mineral tersebut ataupun syarat-syarat yang termaktub dalam pajakan melombong, tindakan yang sewajarnya boleh dikenakan keatas pemegang pajakan melombong iaitu Defendan, setuju?

H

J: Setuju.

I

The Issue On Forgery Of The Permit To Mine

[43] The failure to provide the mining report by itself will provide the occasion for the defendant to regard the Mining Agreement as having been breached. This it did, and going by the sequence of events as presented by the evidence, the defendant actually gave the plaintiff further time to submit the mining report up to 25 November 2009. Even with the extension given no mining report was provided. The defendant did not grant a second extension thereafter, and it was at this stage that the defendant's previous solicitors raised the issue of Chua Soo Heng (PW7) being an undischarged bankrupt. Defendant then entered into a without prejudice negotiation with the plaintiff with a view to the entering of a fresh agreement. The without prejudice negotiation came to a halt when the defendant discovered that the plaintiff had in fact entered the mine and carried out illegal mining activities without the defendant's knowledge. Interestingly, at that stage the plaintiff did not deny that it had commenced mining activities, and further told the defendant through its solicitors, that since the defendant was so insistent to breach the agreement, the plaintiff had no choice except to accept the defendants breach. As the plaintiff's solicitors put it – "without prejudice to our client's rights."

[44] It was at this juncture that there were applications made by the plaintiff for several injunctive orders before the High Court on 20 January 2010, 28 January 2010, 24 February 2010 and 2 April 2010. The effect of the interlocutory order granted after hearing *inter partes* was to allow the plaintiff to carry out mining activities on the land. This order was varied by the Court of Appeal when it heard the notice of motion filed by the defendant and granted an interim order on 10 May 2010 to restrain the plaintiff from carrying out the mining activities pending the hearing and outcome of the defendant's appeal before the Court of Appeal. The defendant's appeal was heard on 23 June 2010 whereupon the Court of Appeal allowed the appeal and ordered that the plaintiff be restrained from entering the mine to carry out any work and at the same time restrained the defendant from entering into any other agreement in respect of the mine.

[45] It was argued by the plaintiff that it carried out some limited mining of iron ore and carried out mining activities only for a short stint between 2 April 2010, ie, when the plaintiff's *inter partes* application was allowed to 10 May 2010, ie, the date when the

A Court of Appeal granted an interim order to restrain the plaintiff from carrying out the mining activities pending the hearing of the appeal proper.

[46] It is common ground between the parties, and this is borne
B out by the evidence too, that before the miner could commence mining on the land, it had to obtain the OMS. And the issuance of the OMS was dependent on the forwarding of the critical document, ie, the permit to mine. Section 40 of the Mineral Development Act 1994 is the pertinent section in this regard.

C **[47]** It is in evidence that the defendant's solicitors had issued a letter dated 27 July 2010 to inform the plaintiff through its solicitors that the Mining Agreement had been indisputably determined and the deposit forfeited pursuant to cl. 7.5 of the Mining Agreement, and without prejudice to the defendant's rights
D and legal position. See pp. 191 to 192 of bundle B for a copy of the letter. Yet the evidence presented before this court disclose three copies of the permit to mine were allegedly executed by the defendant on or about 5 November 2009. The three copies of the permit to mine appear as D54, P88 and ID8.
E

[48] It is important to note that the permit to mine was also signed by the Director of the plaintiff, Cheng Kam Thai, but this Director was not called as a witness, despite my asking whether she would be called and despite an initial response given that she
F would. She would have been the best person to testify to the validity of the permit to mine on the issue of whether the defendant had signed the same. In the circumstances, I am of the view that it is fair to draw an adverse inference under s. 114(g) of the Evidence Act in that if she had been called the evidence
G would have been unfavourable to the plaintiff.

[49] It is also part of the evidence that the OMS was approved on 3 February 2010, and the copies of the OMS were collected by Chua Soo Heng from PW4 (Zainal Abidin bin Md Nor).
H PW4 is the Deputy Director of Jabatan Mineral Dan Geosains Malaysia (JMG). Nevertheless, it is also part of the evidence, admitted by PWE4, that the defendant had expressly requested him to postpone the issuance of the OMS and in fact had informed him that she had terminated the operation of the plaintiff
I and did not want the plaintiff to carry out mining activities on the land.

[50] Throughout the trial, the defendant maintained a consistent stand that she did not sign the permit to mine. As I indicated earlier, the strongest evidence in support of the plaintiff's assertion that there was no forgery of her signature comes by way of the evidence of PW2, Theresa Anthonysamy, who is an interested witness, being a clerk of Chua Soo Heng.

[51] Despite the extensive and spirited submission, and exposition of the law, by plaintiff's counsel on the issue of forgery of the permit to mine, I am mindful that although the burden of proof on this issue lies with the defendant, the standard of proof required in the case of a forgery of a document is still proof on a balance of probabilities. This is made clear by the Federal Court in *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, applying the earlier decision in *Saminathan v. Pappa* [1980] 1 LNS 174. See also the recent decision of Mary Lim JC (as her ladyship then was) in *Omega Securities Sdn Bhd v. Kok Fook Loy* [2010] 8 CLJ 888, where the court also referred to the Court of Appeal decisions in *Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals* [2008] 3 CLJ 692, *Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd* and *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1.

[52] Plaintiff's counsel cites *inter alia* relevant passages from Sarkar's *Proof of Documents – Civil & Criminal* (third edition) in support of the argument that the evidence of an expert in relation to proof of handwriting should not be regarded as conclusive. Counsel is here referring to the evidence of PW8, Iskandar bin Azman, from the chemistry department who provided evidence as a handwriting expert. I do not entertain any doubt on these general principles, which I reproduce below, but ultimately proof of forgery of handwriting as to be decided on the totality of the evidence presented before this court bearing in mind the direct and circumstantial evidence bearing on the question. I quote the relevant parts of the commentary cited by counsel for the plaintiff:

> The expert's evidence as to handwriting is opinion and it can rarely, if ever, take the place of substantial evidence. Before acting on such evidence it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence ...
>
> Evidence of Handwriting Expert - Reliability of such evidence depends on quality of evidence and the court has to decide in each case on its merits ...

A Evidence given by an expert of handwriting can never be conclusive because it is after all an opinion evidence. In other words, expert opinion is of no use in the absence of direct evidence ...

B The handwriting expert is a competent witness whose opinion evidence is recognised as relevant under the provisions of the Evidence Act ... It would therefore, not be fair to approach the opinion evidence with suspicion and the correct approach would be to weigh the reasons on which it is based ...

C The quality of expert opinion would depend on the soundness of the reasons on which it is founded. But the court cannot afford to overlook the fact that the science of identification of handwriting is an imperfect and frail one as compared to the signs of identification of fingerprints; courts have therefore, been wary in placing implicit reliance on such opinion evidence and have looked
D for corroboration but this is not to say that it is a rule of prudence of general application regardless of the circumstances of the case and the quality of expert evidence. No hard and fast rule can be laid down in this behalf but the court has to decide in each case on its merits what weight he should attach to the
E opinion of the expert ... (see pages 250 and 255 of the commentary)

[53] These principles are reflected in our Supreme Court decision in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31:

F The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of the witnesses it has seen and heard and taking into account any expert evidence on the point. Of course, a trial judge is not entitled to abdicate his
G function by allowing the expert to determine the question ...

... in the textbook, *The Identification of Handwriting and the Cross-examination of Experts* by MK Mehta ... the learned author states ...

H It is common failing in a number of experts that they do not clearly state their reasons on which they base their opinions while submitting the reports to the courts. The result is that the courts as well as lawyers suffer from a distinct disadvantage. It is extremely difficult for them in such cases to test and verify the
I correctness of the opinions given. The mere opinion of the expert that a particular writing or signature is written or not written by the writer who standard admitted writing or signatures were supplied to him for comparison, without any cogent reason, is not

enough. The function of expert is to give his honest opinion and place before the court all the data on which he bases his opinion, because it is the court who has to decide the case and accept or reject his opinion. In the absence of a clear and precise statement of his reasons, it is difficult for the court to appreciate the opinion of the expert. It is also not fair to the opposite side who is to cross examine the expert on the correctness of his opinion. Any opinion given without stating the reasons is valueless and is of no use as evidence. (At p. 187 of the report)

[54] I am satisfied on the evidence presented by the handwriting expert in this case that he has placed before this court the data and methodology on which he has based his opinion. Such is evidenced in the following part of the notes of evidence which I am quoting *in extenso*:

Q5: Anda pernah memberi keterangan di mana-mana Mahkamah mengenai dokumen-dokumen yang anda telah memeriksa? Berapa kali?

A: Ya. Sebanyak 3 kali. Ini adalah kali yang ke-5 rasanya.

Q6: Sila beritahu Mahkamah Mulia ini siapakah yang melantik anda untuk membuat kajian ke atas dokumen-dokumen dalam repot di Ikatan C, ms 5-6?

A: Dokumen-dokumen di dalam ms 5-6 Ikatan C telah diberi kepada saya oleh Inspektor Mohd Razif bin Md Wahi pada 19.5.2010. Arahan daripada polis.

Q7: Sila lihat Ikatan C, ms 5. Anda telah memeriksa lima dokumen yang ditanda sebagai S1 sehingga S5. Anda ada dokumen-dokumen S1 sehingga S5 di Mahkamah hari ini?

A: Tiada.

Q8: Adakah dokumen-dokumen S1 sehingga S5 salinan asal atau salinan fotokopi?

A: Dokumen-dokumen ini adalah salinan asal dan bukanlah salinan fotokopi.

Q10: Adakah butiran ini bahawa dokumen S1 sehingga S5 adalah asal, dinyatakan dalam repot anda?

A: Tidak, hanya dinyatakan jikalau ianya fotokopi.

Q11: Adakah fakta bahawa sesuatu dokumen yang anda periksa itu adalah salinan asal atau fotokopi, satu fakta yang penting?

A: Ya.

Q12: Sila maklum kepada mahkamah bagaimana pihak forensic membuat kajian terhadap sesuatu tulisan, apakah bahan kimia yang digunakan?

A: Dalam pemeriksaan tandatangan, kami menggunakan teknik visual dan juga menggunakan alat-alat jikalau diperlukan.

S: Tolong jelaskan jawapan yang kamu maksudkan teknik visual?

J: Kami bandingkan di antara tandatangan yang dipertikaikan dengan spesimen dengan melihat ciri-ciri tulisan tangan yang ada.

S: Dengan erti kata lain kamu bandingkan dengan mata kasar atau dengan apa-apa omission?

J: Kadang-kadang kami menggunakan kanta pembesar atau mikroskop. Begitu juga dengan mata kasar.

Q13: Tolong lihat spesimen-spesimen S1 dan S5. Spesimen S1 kononnya dibuat pada 3.1.2008, iaitu tahun 2008, betul?

A: Benar.

Q16: Sekarang lihat spesimen S5. Spesimen S5 kononnya dibuat dalam tahun 14.5.2010, betul?

A: Betul.

Q17: Adakah tandatangan spesimen S1 dan spesimen S5 sama dan seiras?

A: Seiras dan consistent.

Q18: Dari pengalaman anda, bolehkan tandatangan seseorang berubah sedikit dalam jangkamasa 2 tahun, umpamannya S1 dalam tahun 2008 dan S5 dalam tahun 2010?

A: Boleh.

Q19: En. Iskandar, sekarang lihat Ikatan A, ms 12. Anda kenal tandatangan di bahagian atas?

A: Ia hampir serupa dengan tandatangan yang saya analisis.

Q20: Itu adalah tandatangan Tengku Zaiton yang ditandatangani pada 11.8.2009, benar?

A: Saya tidak tahu tandatangan ini milik siapa.

Q21: Adakah tandatangan di affidavit bertarikh 11.3.2010 adalah tandatangan yang sama dengan perjanjian yang diberikan kepada kamu?

A: Saya tidak boleh membuat analisis pada masa ini untuk membandingkan.

Mr. Jason:

Perhaps it is not the best position to affirm that an actual signature of any client or whoever else. You can compare but not to confirm.

Q22: Adakah tandatangan Tengku Zaiton di Ikatan A, ms 12 sama dari segi saiz, spacing, word spacing, line spacing, angle, thread dengan tandatangan di Ikatan H, ms 168?

A: Saya rasa ini bukan tempatnya saya menganalisis secara spesifik.

S: Kamu telah maklumkan salah satu cara untuk menganalisis adalah dengan menggunakan mata kasar. Jadi dengan menggunakan mata kasar bolehkah kamu analisis?

J: Untuk masa ini saya tidak boleh membandingkan.

Q23: Dari report anda, anda telah diberi satu Permit to Mine, dirujuk sebagai "Q", untuk diperiksa. Adakah Permit to Mine (Q) dokumen yang dirujuk dalam Ikatan D, ms 128 - 130?

A: Tidak.

S: Kalau tidak, Permit to Mine yang manakah telah diberikan kepada kamu oleh polis untuk dianalisa?

J: Saya telah diberi satu dokumen Permit to Mine yang bertarikh 5.11.2009.

S: Kamu ada salinan?

J: Ada (PW8 kemukakan salinan kepada Mahkamah).

Q24: Adakah Permit to Mine (Q) yang ditanda sebagai Eksibit "ID8" ini yang telah diberikan kepada anda untuk diperiksa?

A: Tidak. Yang diberikan kepada saya adalah yang telah dicop Jabatan Kimia.

S: Adakah Permit to Mine yang diberikan kepada kamu dan ID8 berbeza

J: Permit to Mine dalam ID8 tidak mempunyai cop dari Jabatan Kimia Malaysia yang menandakan nombor makmal bagi kes ini.

S: Apakah perbezaan yang ketara?

J: Ia tidak mempunyai tanda "Q" pada dokumen dan tanda "Q1" pada tandatangan yang dipertikaikan.

S: Q1 dan Q2 adalah tandatangan siapa?

J: Q1 – Tengku Zaiton, Q2 – Bhoumidi.

S: Sila lihat tandatangan di P2 dengan tandatangan dalam rekod permit to mine rekod kamu, adakah kedua-dua tandatangan sama dari segi saiz, spacing, word spacing, line spacing, angle, thread dari mata kasar?

J: Daripada mata kasar ada perbezaan.

Q25: Adakah tandatangan Tengku Zaiton di Ikatan A ms 12 sama dari segi saiz, spacing, word spacing, line spacing, angle, thread dengan tandatangan di Ikatan D ms 130?

A: Daripada pemeriksaan mata kasar, ia terdapat beberapa perbezaan.

Q26: Sila lihat spesimen S1 yang kononnya dibuat pada 3.1.2008 dengan spesimen tandatangan S5 yang kononnya dibuat pada 14.5.2010. Adakah kedua-dua tandatangan sama dari segi saiz, spacing, word spacing, line spacing, angle, thread atau berlainan sedikit?

A: Ia tidak mempunyai perbezaan yang ketara dan konsisten.

Q26: Sekarang lihat spesimen S5 yang kononnya dibuat pada 14.5.2010 dengan tandatangan di Ikatan H, ms 287 yang dibuat pada 8.5.2010. Kedua-dua tandatangan dibuat dalam bulan Mei 2010. Adakah kedua-dua tandatangan sama dari segi saiz, spacing, word spacing, line spacing, angle, thread?

A: Saya tidak boleh membuat perbandingan buat masa ini kerana saya memerlukan masa yang lebih dan tempat yang sesuai untuk membuat pemeriksaan.

S: Sekiranya jawapan bagi semua soalan saya memerlukan masa.

J: Boleh, kami boleh memeriksa tandatangan yang diberikan untuk dibandingkan dengan apa-apa dokumen yang dipertikaikan.

S: Bolehkah kamu gunakan kanta pembesar yang bukan rumit sangat untuk dibandingkan?

J: Tidak, saya perlukan spesimen yang cukup, alat-alat lain jikalau diperlukan mengikut kes ini.

S: Soalan saya seterusnya, saksi dirujuk kepada salinan asal seperti di Ikatan H, p. 60, Sila lihat ID70. Sila bandingkan dokumen yang diberikan dengan tandatangan di P2. Dan juga perjanjian asal bagi surat perjanjian berkenaan Ford Ranger. Sila bandingkan tandatangan di bawah dengan tandatangan di P2, adakah sama dari segi saiz, spacing, word spacing, line spacing, angle, thread?

J: Secara mata kasar ia mempunyai beberapa perbezaan dan juga beberapa persamaan.

S: Apakah perbezaan dan apakah persamaan?

J: Secara mata kasar terdapat perbezaan dalam saiz tandatangan. Persamaan adalah sama dengan design dan appearance.

S: Sila bezakan P2 dengan affidavit di lampiran 17 di ms 179 ikatan H. Apakah perbezaan dan persamaan dari segi saiz, spacing, word spacing, line spacing, angle, thread?

J: Secara mata kasar saya hanya nampak perbezaan dari segi saiz manakala persamaan dari segi design dan appearance.

S: Lihat tandatangan dalam P2 dan juga ms 179 Ikatan H. Sila lihat secara teliti tandatangan di P2 terdapat dua lekuk yang besar dan kecil bersentuhan antara sama lain manakala di ms 179 terdapat lekuk "Z" tetapi tidak bersentuhan antara satu sama lain?

J: Saya tidak dapat membuat analisis secara mata kasar kerana saya tidak mempunyai spesimen untuk melihat natural variation, oleh itu saya tidak tahu samada lekuk ini adalah sama atau termasuk dalam natural variation.

S: Sila lihat ms 157 Ikatan H. Sila bandingkan ketiga-tiga tandatangan samada sama, berlainan atau terdapat variasi?

J: Ketiga-tiga tandatangan masih berada dalam design dan appearance yang sama.

S: Sekarang bandingkan ketiga-tiga tandatangan dengan tandatangan di ID8. Adakah ketiga-tiga tandatangan terdahulu berlainan dengan ID8?

J: Masih sama dari segi design dan appearance tetapi saya masih tidak dapat membuat analisa kerana kekurangan alat.

Q33: Dalam membuat laporan kamu di Ikatan C. Adakah anda menggunakan sebarang peralatan seperti mikroskop atau Video Spectral Comparator semasa memeriksa spesimen-spesimen S1, S2, S3, S4 dan S5?

A: Saya ada menggunakan Video Spectral Comprator 6000.

S: Adakah Video Spectral Comprator dinyatakan dalam laporan kamu?

J: Tidak ada.

S: Adakah ianya penting untuk menyatakan peralatan yang digunakan dalam kajian kamu?

J: Untuk mendapat kesimpulan tidak.

S: Sekiranya tidak penting, bagaimanakah pengguna atau Mahkamah akan tahu peralatan yang digunakan dalam kajian kamu?

J: Ada dalam nota saya tetapi dalam laporan saya tidak dinyatakan.

S: Apakah fungsi Video Spectral Comprator?

J: Mempunyai banyak fungsi tetapi dalam kes ini saya gunakan sebagai 'image enhancement' untuk membesarkan tandatangan.

S: Rujuk kepada P2, ID8, ID72, Encl. 10 and Enc. 14. Are the consistence in terms of style and design?

J: They are consistent in terms of design and appearance.

S: In your report the specimen of En. Bhoumidi are marked as P1 to P5, correct?

J: Yes.

S: Dari laporan kamu, siapakah tandatangan dalam spesimen P1-P5?

J: Daripada laporan saya dokumen P1-P5 mempunyai contoh tandatangan Bhoumidi Abdlali.

S: Adakah tandatangan Bhoumidi dalam spesimen P1-P5 adalah sama dari segi saiz, spacing, word spacing, line spacing, angle, thread?

J: Tandatangan-tandatangan ini adalah konsisten dan tidak mempunyai perbezaan yang ketara.

S: Sila rujuk kepada lampiran 18 yang termaktub dalam ms 173 ikatan H. Ini adalah tandatangan En. Bhoumidi dan juga sila rujuk lapan cek asal P71 (1-8). Dari analisa mata kasar, adakah tandatangan di lampiran 18 adalah sama dengan cek pertama hingga ke lapan dari segi saiz, spacing, word spacing, line spacing, angle, thread?

J: Ia adalah sama dari segi design dan appearance.

S: Sila bandingkan tandatangan P71 (1-8) dengan tandatangan di ms 173 Ikatan H serta ID8. Adakah ketiga-tiga tandatangan ini sama dari segi design dan appearance?

J: Ya.

Q37: Sila lihat ms 6 Ikatan C. Rujuk para ii serta jawapan no. di atas, adakah analisa kamu konklusif memandangkan terdapat spesimen-spesimen yang lain yang menunjukkan tandatangan adalah sama?

J: Saya tidak menggunakan spesimen ini dalam laporan saya.

Mahkamah

Apakah tahap kepastian dalam laporan?

PW8: Dalam tandatangan atas nama Bhoumidi, tahap kepastian adalah paling rendah. Dalam kes ini adalah kerana may not had been written digunakan kerana terdapat limited characteristic for comparation. Ia juga digunakan kerana limited differences were found. Ia juga adalah satu simple signature yang mudah ditiru.

S: Tahap kepastian kamu adalah paling rendah, tolong jelaskan?

J: We have different level of opinion which we used and based on our specimen and other factors, we have to vary our opinion. In this case because of this signature is simple and limited characteristic of signature, we cannot provide higher opinion.

A S: This afternoon you were provide two extra specimen ie, page 173 of H and also ID8 as well as your earlier P1 to P9. Can you now conclusively state at the higher level of these signatures of Bhoumidi are ..?

B J: My opinion in my report was not based on design and appearance alone.

[55] Based on these recognised principles, and having considered the full circumstances of the case, the quality of expert evidence, and the direct and circumstantial evidence available (including C corroborative evidence), I am of the view that the defendant has proven on a balance of probabilities her claim that her alleged signature on the permit to mine was forged. I do so for the following reasons:

D 1. In the month of November, when the Permit to Mine was signed, the defendant had elected to treat the Mining Agreement as having been breached by the plaintiff. It is a matter of evidence presented before this court that the defendant had by this time provided the plaintiff a last E opportunity to present the mining report by 25 November 2009.

2. The defendant had expressly requested PW4 sometime in January 2010 to postpone the issuance of the OMS and in fact had informed this Deputy Director of Jabatan Mineral F Dan Geosains Malaysia (JMG) that she had terminated the operation of the plaintiff and did not want the plaintiff to carry out mining activities on the land.

3. The OMS was nevertheless approved on 3 February 2010 and G on the same day PW4 allowed the two copies of the OMS to be collected by Chua Soo Heng (PW7) without the knowledge of the defendant.

4. In fact, the defendant had by then, and to the knowledge of H JMG, expressly revoked her letter of authorisation to the plaintiff. See exh. D50, which appears on p. 170 of bundle B. This letter was received by JMG on 27 January 2010.

5. The defendant came to know of the issuance of the OMS only on 2 March 2010, whereupon she lodged a police report I on the same day stating that a signature as well as her husband's signature had been forged on the Permit to Mine. See exh. D39.

6. The copies of the OMS were collected by Chua Soo Heng, and this is evident by exh. D53 ("Borang Pengakuan"), in which Chua Soo Heng acknowledged receipt of the OMS but the signature of the recipient is not Chua Soo Heng but Cheng Kam Thai! And this alleged signature of Chiang Kam Thai appears quite different to the naked eye when compared with her signature on the Permit to Mine. Even more remarkable is the significant difference which can be seen between Cheng Kam Thai's signature on the Permit to Mine and her signature on an affidavit affirmed by her in proceedings in the Temerloh High Court on 20 July 2010. This affidavit was produced in court as exh. D85. Even Chua Soo Heng could not provide a credible explanation on this when cross-examined:

239Q: You confirm the signature of Cheng Kam Thai and in page 3 of Bundle C – Permit to Mine are genuinely hers?

A: Yes.

240Q: Please look at the real signature of Cheng Kam Thai (Mr. Jason show an Affidavits of Cheng Kam Thai filed in Temerloh High Court *vide* 22-33-2010, affidavit affirmed on 20.7.2010 to Court). Look at the jurat and also ID70. Can you see the difference?

A: Yes.

241Q: Refer to page 12 of Bundle A. The Mining Agreement signed by you. Do you see the similarity of your signature and Cheng Kam Thai signature allegedly at ID70 and page 3 of the Permit to Mine contras with the signature on the affidavit which is completely different?

A: I disagree because her signature might change. Sometimes she signed this way and on the other hand she signed differently.

Court

So which signature is correct?

PW1: All these was signed by her.

242Q: I put it to you that you have no hesitation to forge another person's signature including Cheng Kam Thai and the Defendant and her husband for your own gain?

A: I disagree. I wouldn't get anything. What benefit did I get?

Court

Entire affidavit of Cheng Kam Thai marked as D85.

7. The evidence of PW2 and PW7 in relation to another document alleged by the defendant to also contain her forged signature (ID72) has been shown to be suspect. This document concerns an alleged agreement in relation to a purchase of a Ford Ranger vehicle by the defendant from Cheng Kam Thai. Both witnesses could not even get the date, when this alleged Agreement was signed, correct. This document is the subject matter of police investigation, and as such I do not propose to dwell on it further than is necessary except to underline the effect of this particular piece of evidence on the credibility and veracity of PW2's and PW7's evidence in relation to this document as well as on the Permit to Mine.

8. As noted earlier, the expert evidence of PW8 remains unshaken despite rigorous examination by counsel. I quote below some relevant parts of his testimony:

1. Q: For the purpose of your finding at page 6 (i) concerning the signature of Tengku Zaiton, you were referred to several documents today including P2, ID8, ID72, and various affidavits affirmed by Tengku Zaiton. Your answer was I believe that based usually on naked eye the various signature shows similarity in design. Does that alter your finding in the reports?

A: No.

2. Q: Do you wish to elaborate?

A: Because my findings were based on more than design and appearance therefore it does not alter my findings.

3. Q: In your experience would it be fair to say that all forged documents or documents which are forged would have similarities in design and appearance with the genuine signature of a person?

A: Most documents which are forged would have a similarity in design and appearance but they are different.

4. Q: In your opinion is it possible for a forged document to be so well carried out that it does not show clear difference under the naked eye?

A: Yes.

5. Q: Coming to the signature of Mr. Bhoumidi and your finding at page 6(ii). Would it be fair to say that Mr. Bhoumidi has a far simpler signature compared to Q1?

A: In my opinion, yes.

6. Q: Does it follow that a simple design in signature means it is easier to forge?

A: Yes.

7. Q: You also shown various documents pertaining to Mr. Bhoumidi signature, does it alter your finding of your report at (ii) in anyway?

A: Just looking at the signature, it does not alter my opinion and also my report.

Court

Did you analyse the name?

PW8: No, it was not requested by the police.

Court

Are still referring to loops?

PW8: Yes.

...

1. Q: Refer to the signature at page 3 of Bundle C. Also refer to page 60 of Bundle H or you can refer to ID8. Look at the signature of Cheng Kam Thai and also ID72. Please also refer to D85. If you flip the pages you will see a jurat. Based on the best of your experience and opinion, could the signature signed on the affidavit come from the same person who signed the two documents ie, ID72 and ID8?

A: Yes, it could because in this case it is highly different structure. The person may have two difference signatures that we don't know of. Very different in structure.

Court

In your experience, have you come across someone having two signatures in a year?:

PW8: Some people do have, normally in banking. In this case I wouldn't be able to say anything.

The Various Breaches Of The Mining Agreement

[56] Aside from the failure to supply the mining report, which I have alluded to at some length above, I also find the plaintiff has been guilty of major breaches of the Mining Agreement in respect of conducting mining operations behind the back of the defendant even before the OMS was issued, and using foreign and illegal workers on the mine contrary to conditions of the mining lease. As I have indicated at the outset of this judgment, the site inspection which I conducted has reinforced my finding that there were mining operations on the defendant's mining parcel. The attempt by the plaintiff to show that the stockpile of iron ore placed on the defendant's parcel came partly from Tunku Shahariah's land, which is the neighbouring mining parcel, cannot assist the plaintiff's case, since the OMS for Tunku Shahariah's land was also issued well after mining operations were illegally commenced sometime in or about November 2009. The OMS for Tunku Shahariah's land was only issued on 19 January 2010! And the palong for washing the iron ore is established to have been constructed on the defendant's land, although allegedly for the ore mined on Tunku Shahariah's land. I find it difficult to accept the plaintiff's contention that allegedly it was unsure or mistaken as to where the boundary was at that time. From the site visit, I could observe clear boundary marks separating the two parcels of land.

Conclusion

[57] To recapitulate, and by way of conclusion, I find that the defendant has succeeded in proving her case on the counterclaim. The plaintiff, on the other hand, has come to court with clearly tainted hands, particularly when it has sought to even rely on a forged permit to mine, such that it cannot be said to deserve, or be entitled to, any relief of the court. I therefore dismiss the

plaintiff's claim with costs to be taxed and order and enter judgment in favour of the defendant on the counterclaim in the following terms:

(a) That the Agreement dated 11 August 2009 between the plaintiff and the defendant is declared null and void, or alternatively, has been terminated by the breaches of the plaintiff;

(b) That the deposit of RM1,000,000 paid to the plaintiff be lawfully forfeited by the defendant;

(c) Special damages of RM300,000 per month from January 2010 until the date of this judgment;

(d) Interest at 8% per annum on the amount of damages awarded from the date of filing of this counterclaim until full realisation;

(e) Costs to be taxed;

(f) An order that the original approval letter, Mining Lease, the certified true copy of the Permit to Mine and OMS be returned to the defendant by the plaintiff forthwith;

(g) An order that the Original Permit to Mine (ID8) and the Original Purported Agreement in relation to a vehicle WSP8850 (ID89) be released to the police for the furtherance of their investigation in relation to the forgery of these documents.

[58] I am calculating the damages payable from January 2010 until the date of this judgment on the basis that the mining operations, by the agreement, should have commenced from this date, and further, it is clear from the position taken by the plaintiff, through its solicitors, that by cl. 6.1 of the Mining Agreement, the deadline for the commencement of mining operations would have been on 14 January 2010 as the mining lease was obtained on 14 October 2009. I am here referring to exh. 44, which appears on p. 12 of bundle B.